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January 8, 2001

REDACTED – FOR PUBLIC INSPECTION

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Joint Application by SBC et al for Provision of In-Region InterLATA Service in Kansas and Oklahoma
CC Docket No. 00-217

Dear Ms. Salas:

Enclosed for filing please find the Comments of AT&T Corp. in connection with the above referenced matter. Pursuant to the Public Notice issued December 27, 2000, AT&T is submitting the original and two (2) copy of its comments and supporting exhibits in redacted form.

AT&T is also submitting under seal the portions of supporting exhibits that contain material designated as confidential pursuant to the Protective Order in this matter. These pages bear a legend indicating that they are confidential.

Please let me know if any additional information is required. Thank you.

Very truly yours,

Peter M. Andros
Legal Assistant

Encl.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization to Provide In-Region InterLATA Services in Kansas and Oklahoma	)	**CC Docket No. 00-217**
	)	
Comments Requested In Connection With Southwestern Bell's Section 271 Application For Kansas And Oklahoma	)	

SUPPLEMENTAL COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice dated December 27, 2000, AT&T respectfully submits these supplemental comments concerning SBC's December 27, 2000 *ex parte* submission ("SBC Ex Parte"), in which SBC again proposes new prices for certain unbundled network elements ("UNEs") for Kansas and Oklahoma. *See* SBC Ex Parte at 2 (SBC "will offer," subject to future state commission approval, to make "new" UNE rates available in Kansas and Oklahoma).

The Commission should enforce its section 271 rules and accord the rates proposed in this extraordinary 11th hour filing no weight. SBC was free to propose and receive approval of reduced rates *before* it filed its Application, if it believed (as it should have) that it could not defend the exorbitant rates approved by the Oklahoma and Kansas commissions. Instead, SBC elected to stick with the existing rates that have so effectively foreclosed any significant competition in those two states.

Only on reply – when it became obvious from the comments of DOJ, AT&T and others that those rates were utterly indefensible – did SBC, in direct contravention of the Commission's procedural rules, urge the Commission to ignore the Oklahoma rates it relied upon in the Application in favor of new promotional rates. And now that it has further been shown that those limited Oklahoma reductions do not remotely close the gap between SBC's extraordinarily high rates and the Act's cost-based mandate, SBC – less than a month before the Commission must rule on its Application – promises additional future reductions that will become available, if at all, only after this proceeding closes. SBC's strategy, an even more extreme version of Verizon's similar ploy in Massachusetts, is clear: (1) seek state commission approval of grossly excessive UNE rates that render competitive entry uneconomic; (2) urge the Commission in the subsequent section 271 proceeding to defer blindly to the state commission's rate determinations; (3) if necessary, offer token last-minute rate reductions, knowing that the parties will not be able in the remaining days of the expedited section 271 proceeding even to analyze fully the impact of the reductions – much less to take advantage of those ethereal reductions to mount a competitive entry into the local market. In these circumstances, relying on the proposed new rates would unjustifiably reward SBC for using its power over essential UNE inputs to exclude competitors from the local market. And if the Commission accepts SBC's *ex parte* gambit, SBC's anticompetitive strategy – which makes a mockery of section 271 and the Commission's implementing rules – will inevitably become the norm in all future section 271 proceedings.

It cannot be overemphasized that post-filing changes to a BOC's 271 application are particularly inappropriate when they involve pricing, because CLECs cannot even begin taking the many steps needed to enter a local market until the BOC has established truly cost-based rates on which a CLEC can rely to make the costly and time-consuming investment and

marketing choices required for entry. And no incumbent LEC will ever have an incentive to offer truly cost-based rates if the Commission endorses the "let's make a deal" rate gamesmanship in which SBC has engaged in Kansas and Oklahoma.

The proposed new rates are not only far too late, but far too little. Even a cursory examination of SBC's newest proposals demonstrates that the enormous and wide-ranging mismatch between rates and costs in Oklahoma and Kansas cannot possibly be solved with these targeted, and quite limited, proposed reductions.

As AT&T and others have explained, SBC's Oklahoma recurring rates are the product of a deal between one facilities-based CLEC (with interests that diverge from those of most UNE purchasers), the OCC staff and SBC and were supported by *no* cost evidence. Moreover, although SBC told the Kansas and Oklahoma commissions that the recurring costs in the two states are about the same, the Oklahoma recurring rates greatly exceed those set by the Kansas Commission, which, unlike its Oklahoma counterpart, applied TELRIC principles in establishing recurring rates. SBC has never been able to explain this glaring confirmation that its Oklahoma recurring rates are not cost-based, and the recent *ex parte* does nothing to correct it.

Although SBC now proposes to extend the "alt reg" promotional discounts to all loops (and to remove the arbitrary "line limitations"), no discounts are available, for example, for stand-alone switching, common transport or dedicated transport. Because it remains the case that the alt reg discounts do not displace the permanent rates for all elements and for all purchasers, SBC cannot escape its burden to defend the permanent rates. SBC's failure to eliminate the discriminatory nature of the alt reg discounts, which SBC does not even attempt to explain, demonstrates in and of itself that SBC cannot satisfy the section 271 checklist. Moreover, as detailed below, even where the "alt reg" discounts would apply, the Oklahoma

recurring rates remain substantially in excess of the comparable rates in Kansas (and Texas) and far too high to allow meaningful entry.

SBC fares no better with respect to non-recurring rates ("NRCs"). Both Oklahoma and Kansas approved grossly excessive non-recurring rates that were a product of, *inter alia*, SBC's flatly unlawful manual processing assumptions. The resulting rates were, in some cases, large multiples of cost and frequently double or more the comparable rates in Texas. As the Kansas commission recognized, there is no legitimate basis for such differences, because SBC uses the same common resources and processes to fill UNE orders throughout its Southwestern Bell service area. The proposed new NRCs, determined through Rube Goldberg-esque formulae that apply a 25 percent discount to certain of the approved NRCs, do not remotely solve the problem. As detailed below, SBC would continue to charge, for example, about *50 percent more* for NRCs in connection with a CLEC's UNE-P service to a new customer in Kansas or Oklahoma than for an equivalent new customer service in Texas. And many of the individual NRCs would continue to exceed costs by even greater amounts.

In short, even if the Commission were to consider the SBC ex parte – which it cannot, if the 271 process is to retain any substance at all – the new rates SBC proposes do not come close to bringing its Oklahoma and Kansas rates in line with costs. The SBC Ex Parte does serve one useful purpose, however. It should confirm, once and for all, that SBC has failed to meet its burden in this proceeding. The very fact that SBC would attempt, at this late date, and in violation of the Commission's procedural rules, to propose new rates can only be viewed as a concession that the rates on which the Application was filed (and, indeed, even the rates SBC subsequently relied on in its Reply Comments) are not cost-based.

I. THE COMMISSION SHOULD GIVE NO WEIGHT TO THE PROPOSED NEW RATES.

The Commission's procedural rules are clear. A BOC's section 271 application must be "complete when filed." *Michigan 271 Order* Part IV.B.[1] In particular, a BOC may not supplement the record with new facts, let alone with new promises, after the date reply comments are due. *Michigan 271 Order* ¶ 51. Such late supplementation is to be accorded "no weight." *Id.*

Enforcement of this rule is particularly important when it comes to pricing. There is no simpler way for a BOC to block competitive entry than to resist setting truly cost-based UNE rates. When UNE rates in a given state exceed costs, as they do in both Kansas and Oklahoma, there is no valid business case to be made for UNE-based local entry in that state. In that circumstance, a CLEC has no incentive to expend the substantial resources to conduct the market research and other activities needed to develop and refine a business plan for that state. And without a business plan, a CLEC will not make the substantial investments in writing and entering software code and taking the other steps required to customize and deploy the systems needed to support the provision of local exchange service in a given state. Instead, CLECs will concentrate their entry efforts on other states where UNE rates make local entry economically viable.

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[1] *See, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997) ("*Michigan 271 Order*"). *See also* Public Notice *Comments Requested on the Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Kansas and Oklahoma,* CC Docket No. 00-217 (Oct. 26, 2000) (adopting the "general procedural requirements of Public Notice, *Updated Filing Requirements For Bell Operating Company Applications Under Section 271 Of The Communications Act,* DA-99-1994, at 3 (Sep. 28, 1999)).

In short, although SBC can alter its rates with a stroke of a pen, CLECs cannot respond with comparable speed. It takes months for a CLEC to develop a business plan for a particular state, to design and conduct market-readiness testing, to ensure that all operations support systems and other support processes are operationally ready and capable of supporting a local offer in a new state, and to launch broad-based service. Thus, so long as a BOC keeps UNE rates above cost, it ensures that competitive UNE-based entry is many months away.

SBC is well aware of this basic fact. Indeed, all BOCs are aware of it. Verizon pioneered the concept of the UNE rate post-filing bait-and-switch with its unsuccessful Massachusetts application, in which Verizon attempted to rely on new UNE rates filed just one business day before comments on its application were due. SBC took Verizon one step further by waiting until its Reply Comments to rely on the promotional Oklahoma UNE rates. SBC's most recent gambit, waiting until less than a month before the Commission's decision is due to propose allegedly cost-based rates, now takes this anticompetitive gambit to new heights. SBC's tardy submission is an extreme and indefensible attempt to delay competitive entry while attempting to obtain an extraordinary competitive advantage.

If the Commission were to approve this application on the basis of these newly filed rates – whether at the end of the current 90-day period or after some nominal delay for "restarting the clock" – it would effectively send a signal to every BOC that it is open season to deny CLECs any element crucial to market entry until the eve of its section 271 application. The BOC, of course, would have every incentive to do just this. By denying competitors any incentive even to begin developing a business plan, and by maintaining such an unlawful stance right up to (or even after) the filing of its § 271 application, a BOC immediately gains an enormous advantage that will enable it to perpetuate much, if not all, of its local monopoly even after it has, as a

purely formal matter, been deemed to have "opened" its local markets to competition. The only way to discourage this type of anticompetitive behavior is to focus on evidence relating to the actual commercial environment in the study area where the § 271 petition has been filed, and to require that all evidence relating to the actual competitive environment be "complete when filed." In this way, the incentive for BOCs to engage in these bait-and-switch tactics will be significantly reduced.

II. The Proposed New Discounts Do Not Make SBC's Oklahoma And Kansas Rates Cost-Based.

AT&T, DOJ and others have conclusively demonstrated that the Oklahoma and Kansas rates that SBC has relied upon in its Joint Application (as well as those it relied upon in its reply comments) are not cost-based. The Joint Application should be denied for that reason alone. But even if the Commission could legitimately consider the new rates proposed in SBC's most recent *ex parte* submission, the selective new discounts SBC has proposed plainly do not produce cost-based rates.

Notwithstanding SBC's concession that Oklahoma costs are generally the same or lower than Kansas costs (and in the case of rural zone loops, much lower), the discounted Oklahoma recurring rates would remain 15 percent higher than the corresponding Kansas rates.[2] Thus, the SBC Ex Parte proposals do nothing to change the key fact that the Oklahoma and Kansas recurring rates cannot both be cost-based. Likewise, even after the proposed new discounts, the NRCs in both Kansas and Oklahoma would remain *fully 48-53 percent* greater than the comparable rates in Texas, even though SBC uses the *same* processes and the *same* resources to fill UNE orders in all of its southwestern states. *See id.*, ¶ 20.

[2] Declaration of Richard N. Clarke ("Clarke Decl."), attached hereto as Exhibit A.

Oklahoma Recurring Rates. SBC advocated for the first time on reply that the Commission base its rate determinations, not on the permanent Oklahoma recurring rates upon which the Application was based, but upon promotional "alt reg" discounts to certain of those rates. AT&T explained in its reply comments why: (1) the Commission should not accept this bait-and-switch supplementation, and (2) the Oklahoma recurring rates are not cost-based even with the alt reg discounts. The bottom line is this: the alt reg discounts are arbitrary reductions – supported by no cost evidence – to arbitrary permanent rates, that are themselves supported by no cost evidence and were merely the product of an unprincipled deal. Furthermore, SBC did not even offer the alt reg discounts for all elements, to all UNE purchasers, or at all times. *See* AT&T Reply at 10-14.

The SBC Ex Parte proposes only two changes to these alt reg discounts: (1) a discount is proposed for all loops that previously qualified for no discount, and (2) SBC promises not to enforce the arbitrary "line limitations," that would have terminated discounts in, *inter alia*, areas in which CLECs were serving more than 25% of the lines. Those two changes do not make the Oklahoma rates cost-based (indeed, the latter change does not impact the level of the rates at all).

In its opening comments, AT&T identified the fundamental incongruity of this Joint Application. Everyone agrees that the recurring costs of providing UNEs are virtually identical in Kansas and Oklahoma. The sole material exception is rural zone loops, which are significantly more costly to provide in *Kansas*. Yet, it has been true from the outset – and it would remain true after the proposed new discounts – that SBC's Oklahoma recurring rates greatly exceed its Kansas recurring rates. SBC has never been able to come up with a cost-based explanation for this mismatch, and none is possible. The simple fact is that the Kansas

commission applied TELRIC principles in establishing recurring rates, and the Oklahoma commission did not.

As explained in the accompanying declaration of Richard N. Clarke, even after the latest round of discounts, SBC's Oklahoma recurring rates for serving a residential customer with the UNE platform continue to exceed its Kansas recurring rates by 15 percent. *See* Clarke Decl. ¶ 16. That translates into a monthly penalty on Oklahoma UNE purchasers of *three dollars per customer line per month*. *See id.* Deviations from cost of that magnitude are competition-foreclosing, and they cannot, in good conscience, be ignored, particularly, where, as here, there was not even a serious attempt by the state commission to ensure that SBC's rates are cost-based. These excessive prices for recurring cost elements in Oklahoma are even more anomalous when the results of publicly available TELRIC models are considered. *See id.*, ¶ 18. Both the Commission's Synthesis model and the HAI model show similar costs in Oklahoma as in Kansas or Texas, when wire centers of similar sizes are compared. *See id.* ¶ 17.[3]

Moreover, there are no alt reg discounts for many important recurring charges, including stand-alone switching, common transport and dedicated transport. *See* Flappan/Browne Supp. Decl. ¶ 11.[4] Facilities-based UNE purchasers would therefore remain tied to the permanent Oklahoma recurring rates that SBC no longer even attempts to defend. SBC's burden in this

[3] Because the Kansas recurring charges are very close to SBC's Texas recurring charges, a comparison between Oklahoma and Texas yields similarly large discrepancies. In its reply comments, SBC claimed that mismatches between Texas and Oklahoma are explained by a mismatch in rate zones between those states. Even if true, that could not explain the nearly identical mismatch between Kansas and Oklahoma rates. Moreover, it is not true that the most comparable Texas rate zones to Oklahoma rate zones are one degree more rural. The metric upon which SBC establishes rate zones (size of local calling areas measured by number of lines) has little relevance for the cost of UNE-P service (which is most closely related to wire center size and the density with which lines exist within wire center boundaries). *See* Clarke Decl. ¶ 18.

[4] Supplemental Declaration of Robert P. Flappan and Wauneta B. Browne on Behalf of AT&T (Flappan/Browne Supp. Decl.), attached hereto as Exhibit B.

proceeding is, of course, to demonstrate that *all* of its recurring and non-recurring UNE rates are properly cost-based, and thus the SBC Ex Parte could not support approval of the Joint Application even if it produced cost-based UNE-P rates (which, of course, it does not).

Kansas and Oklahoma NRCs. With respect to NRCs, the continuing deviation from costs is even more obvious. As AT&T and others demonstrated in their comments, the Kansas NRCs (which, for the most part, were derived by averaging cost-based AT&T proposals with SBC proposals that the Kansas commission conceded were massively inflated by unlawful manual processing assumptions) and the Oklahoma NRCs (which were supported by no discernible methodology at all) exceed cost-based rates by more than a hundred percent. *See* AT&T Comments at 20-21; AT&T Reply at 19-20. Reducing selected NRCs by an arbitrary 25 percent, as SBC now proposes, is obviously inadequate to correct problems of this magnitude.

Indeed, the arbitrariness of the convoluted discount formulae alone would support an arbitrary and capricious challenge to any Commission order relying upon the proposed discounts as evidence of cost-based NRCs in Kansas and Oklahoma. In most cases, SBC proposes to apply its "25 percent discount" not to the currently approved NRCs in Kansas as set forth in the Kansas commission's December 22 Reconsideration Order, but to the higher November 3 NRCs that were modified by the Reconsideration Order. But if discounting the November 3 rates would produce a rate lower than the Kansas Commission approved in the Reconsideration Order, SBC proposes to use the reconsideration rate with *no* discount. And in Oklahoma, SBC inexplicably ties the availability of a discount to whether the Oklahoma NRC is higher or lower than the

corresponding NRC under the repudiated November 3 Kansas order, and ignores the December 22 Reconsideration Order altogether. *See* SBC Ex Parte at 3-4.[5]

But the arbitrariness of the Oklahoma and Kansas NRCs – and the continuing chasm between those rates and any conceivable measure of forward-looking costs – is best illustrated by comparing those charges to SBC's Texas charges. As the Kansas Commission repeatedly stated, there is no legitimate basis for significant differences between the NRC levels in SBC's southwestern states. *See KCC NRC Order* at 2[6] ("[p]rices should be similar for similarly defined elements, especially for those cost elements that use common resources within the five SWBT states"). Yet, even after the latest proposed discounts, SBC's Kansas and Oklahoma NRCs would exceed their Texas counterparts by a wide margin.

As explained in the supplemental Flappan/Browne declaration and in the Clarke declaration, a UNE-P purchaser seeking to serve a new customer would still have to pay NRCs in Kansas and Oklahoma that are *48-53 percent higher* than it would pay to serve a similarly situated customer in Texas. *See* Flappan/Browne Suppl. Decl. ¶ 7; Clarke Decl. ¶ 20. That is far too wide a margin to attribute to any legitimate estimation differences in applying forward-looking principles and pricing rules. Moreover, these inflated new service NRCs in Kansas and Oklahoma are particularly important, because a substantial percentage of the customers that

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[5] It is notable that SWBT's proposed NRC discounts in Oklahoma have not incorporated by reference *any* of the rate changes that were made in Kansas under the December 22 Reconsideration Order. *See* Flappan & Browne Suppl. Decl. ¶ 6.

[6] Order Regarding Non-Recurring Charges for Unbundled Network Elements, *In the Matter of the Joint Application of Sprint Communication Company, L.P., United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas, and United Telephone Company of Southeastern Kansas for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. 97-SCCC-149-GIT (November 3, 2000).

purchase CLEC local services are "new service" customers for whom these charges apply. *See* Flappan/Browne Suppl. Decl. ¶ 8.

SBC's response will undoubtedly be the same one it gave in its reply: the differences are not so big if you amortize them over two years. *See* SBC Reply at 15-16. To the contrary, in Oklahoma, for example, such an amortization would mean nearly an additional dollar per customer per month as compared to Texas. *See* Clarke Decl. ¶ 23. When combined with the additional $3.00 in recurring monthly charges for every new customer obtained in Oklahoma compared to Texas, that is roughly $4.00/month in additional costs in Oklahoma for every new residential customer, which would likely wipe out the razor thin UNE profit margins that would exist even if recurring rates were near costs (as they are not in Oklahoma). *See* Clarke Decl. ¶ 23.

Again, the UNE-P numbers do not tell the entire story. Many of the individual NRCs in Oklahoma and Kansas exceed costs (and their Texas analogs) by even greater amounts. For instance, the "feature activation charge" in Kansas and Texas is 5 cents, whereas the same feature activation charge in Oklahoma would be $1.37 under SBC's latest proposal. *See* Flappan/Browne Suppl. Decl. ¶ 9. Similarly, the NRCs for White Page Information in Texas are about $32 compared to over $1,700 in Kansas and Oklahoma. *See id.* The Flappan/Browne supplemental declaration identifies other similar discrepancies in the NCRs for Kansas and Oklahoma compared to those in Texas. *See id.* at Table 2. SBC's burden is to show that all of its rates are cost-based, and it plainly has not met that burden.

CONCLUSION

For the foregoing reasons, the Commission should accord the rates proposed in the SBC Ex Parte no weight. If the Commission considers those rates, it should recognize that they do not produce cost-based rates and deny the Joint Application.

Respectfully submitted,

/s/ Dina Mack 1/05

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